

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
AT&T Petition to Launch a Proceeding)
Concerning the TDM-to-IP Transition)
)

GN Docket No. 12-353

In the Matter of)
)
Petition of the National Telecommunications)
Cooperative Association for a Rulemaking)
to Promote and Sustain the Ongoing TDM-to-IP)
Evolution)
)

REPLY COMMENTS OF GRANITE TELECOMMUNICATIONS, LLC

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I. Introduction and Summary

Granite Telecommunications, LLC (“Granite”) respectfully submits these Reply Comments on the AT&T and NTCA Petitions. While supporting the Commission’s review of the IP transition, Granite views it as critical that the Commission reject AT&T’s contention that the transition warrants elimination of the key pro-competitive measures implemented under the 1996 Act. The Commission should reject AT&T’s Petition.

Contrary to the position of AT&T and its supporters, the transition to IP networks is a gradual evolution of technology, not a flash cut. ILECs will continue to make substantial use of copper and TDM in their networks for the foreseeable future. Moreover, this evolution does not mean the end to the ILECs’ market power over bottleneck last mile connections, and therefore does not eliminate the need for reasonably priced wholesale last mile access in order to preserve

the benefits of competition, particularly for business customers. Contrary to the contentions of AT&T and its supporters, preserving a competitive market through the use of pro-competitive wholesale access requirements will not reduce innovation. Rather, as history demonstrates, it will stimulate innovation.

To facilitate the IP transition, the Commission should update its last mile access competition policies so they are technology neutral. In the business market, CLECs should have access to the ILEC's last mile facilities, regardless of the underlying transmission technology or protocol, wherever competitive deployment of facilities is not economic. As long as the Commission provides for such competitive access to fiber, fixed wireless, and packetized hybrid loops, including to the 64 Kbps channel required under the current rules, copper retirement can occur without harming competition.

Finally, the Commission should deny AT&T's Petition asking for "trials" because the trials will not provide an accurate measure of how AT&T and other ILECs would behave if the deregulation AT&T requests is granted. In addition, the trials that AT&T has proposed¹ would harm customers that have exercised their choice to select competitive providers. If, however, the Commission determines that it should conduct such trials, it must establish rules and procedures to protect customers and ensure that the trial does not harm competition. Thus, it should provide for competitive wholesale pricing and access, including over fiber, and for access to packetized loops where needed.

¹ The trade press has reported a number of statements from AT&T executives on industry panels to the effect that AT&T does not intend to ask for the relief that is quite clearly requested in its Petition. Matthew S. Schwartz, "AT&T Fleshes Out Details of Wire Center Trial Proposal" Communications Daily, Vol. 33, No. 36, Feb. 22, 2013 at p. 1. To date, AT&T has not modified its formal Petition through its Comments or through any *ex parte*, and until it does so, the Commission and the parties have no choice but to take AT&T's Petition at face value.

II. The Evolution to IP Networks Does Not Diminish ILEC Market Power Over Last Mile Access Facilities

In its Initial Comments, Granite demonstrated the fallacy underlying AT&T's petition, that the evolution to IP networks will solve the longstanding policy challenges associated with the lack of competitive alternatives to the ILECs' ubiquitous last mile access network.² Other comments provide widespread support for this view and further undermine AT&T's position.

As the Ad Hoc Telecommunications Users Committee explains, "the market for 'last mile' facilities has remained fundamentally non-competitive because the advent of IP or other 'advanced' switching and transport technologies has not changed the physical realities of 'last mile' deployment."³ Those realities are that "copper, coaxial, or fiber optic connections still need to be deployed on every street in every city and town nationwide."⁴ Thus,

[t]he question is not whether public networks are shifting to IP but whether IP somehow changes the fundamental economics of the network facilities on which IP technologies (just like 'legacy' TDM technologies) depend – the trenches, poles, rights of way, conduit, fiber runs, copper loops, spectrum licenses, municipal permitting for disruptions of streets and pavements, easements, rights of access to buildings, and all the other mundane but necessary inputs for any network.⁵

Without access to reasonably priced last mile facilities, any "requirement that competitive providers construct this infrastructure from scratch creates significant economic barriers to competitive deployment."⁶

² Granite Comments at p. 19.

³ Ad Hoc Comments at p. 10.

⁴ *Id.*

⁵ Ad Hoc Comments at p. 10.

⁶ *Id.*

A. The Shift to IP Networks is a Gradual Evolution That Relies on Existing TDM and Copper Networks

In an *ex parte* filing, AT&T claims that the IP transition involves “engraft[ing] different routing technology on the same standalone ‘telephone’ network, but ... eliminat[ing] any such standalone telephone network in favor of a converged IP ecosystem.”⁷ AT&T’s Petition itself, on the other hand, leaves “the impression ... that, with a turn of the switch, AT&T will deploy a distinct ‘replacement IP network[]’ while fully maintaining its TDM network.”⁸ Comments show that the depiction of the IP transition in AT&T’s Petition is fundamentally at odds with reality. They show that the transition to IP-based broadband networks is gradual, is still in its “early stages,” is “natural” and will continue to progress gradually so that carriers will not be making a “flash-cut” to a new IP-based broadband network.⁹ Granite agrees with those parties that explain that this “highly questionable assumption” underlying AT&T’s Petition— “that there are two separate networks of ‘TDM facilities’ and ‘IP facilities’” — must not serve as the basis for policy changes.¹⁰

It is remarkable, however, that while AT&T apparently wants to bar CLECs from providing TDM-based last mile connections,¹¹ AT&T’s plans for deploying mass market broadband expressly include continued use of last mile copper loops.¹² At the same time, AT&T

⁷ *Ex parte* letter of Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at p. 2 (filed Jan. 14, 2013).

⁸ Nebraska Rural Independent Companies Comments at p. 21 *citing* AT&T Pet. at p. 5.

⁹ *See, e.g.*, CenturyLink Comments at p. 4; Nebraska Rural Independent Carriers Comments at p. 5. NASUCA Comments at p. 4; NARUC Comments at p. 16 (“the shift to IP technology merely changes the technology for managing the existing network.”).

¹⁰ *See* Schools Health and Library Association Comments at p. 2.

¹¹ *See* AT&T Petition at p. 21.

¹² *See* Public Utility Commission of Ohio Comments at p. 7 (observing that AT&T “still

is asking the Commission to replace already lenient rules allowing ILECs to retire copper loops that CLECs may need to serve their customers, with replacement rules that flatly allow ILECs to deny CLECs access to copper whenever the copper is not used by the ILEC, and even though Granite and other CLECs are not permitted access to the fiber. Despite AT&T's rhetoric regarding obsolete copper plant, the existing TDM network is still in use today, will be in use for the foreseeable future, and provides a vital transmission input for the delivery of broadband and IP services by ILECs and CLECs. As commenters noted, many providers of IP and broadband services, including AT&T, CenturyLink and other ILECs, "rely on the ILECs' underlying physical TDM facilities to complete the connections necessary for the provision of those services, including last mile and interconnection inputs."¹³ The Commission should revisit its copper loop retirement rules so that CLECs continue to have access to copper loops during the transition to IP networks where fiber or other competitive alternatives are not made available.

As long as the Commission's rules regarding competitive access to last mile transmission facilities remains in conflict with the technology neutral underpinnings of the Act, it will remain critical to the public interest that the Commission exercise a supervisory role over the retirement of copper loops, so the public continues to have choices among communications suppliers.

Allowing unfettered retirement of copper loops, while at the same time denying CLECs access to fiber where they are impaired, is contrary to the public interest and only undermines competition.

plan[s] on making the most use out of their existing copper facilities through hybrid copper/fiber arrangements as they migrate to all-IP networks."); New Networks Comments at p. 2 ("AT&T's U-Verse service is a PSTN-based-copper-to-the-home service which relies on the aging copper wires that go into customers' homes and offices and have been there for decades.").

¹³ Indiana Utility Regulatory Commission Comments at p. 4.

B. ILECs Continue to Possess Significant Market Power in the Business Market Because they Control Last Mile Bottleneck Facilities

As the Commission established in the *Qwest Phoenix Forbearance Order*, the market for serving business customers must be analyzed separately from the market for serving residential customers¹⁴ In the business market, where Granite provides service, the “ILECs retain their market power advantages in business/enterprise markets generally due to lack of alternative customer access facilities for these types of users in most cases.”¹⁵

Ignoring this distinction and pointing to services such as wireless and cable that are not a substitute for most business customers, ILECs continue to perpetuate the myth propounded in AT&T’s Petition that the mere shift to IP eliminates their vast market power.¹⁶ Disregarding the distinction between business and residential markets, CenturyLink claims that it “faces intense competition from a variety of well-established and new providers, as well as rapidly-evolving new technologies, for all the services it provides and is not dominant with respect to any of them.”¹⁷ Verizon likewise pays little attention to the distinction between business and residential markets, claiming that the expansion of options such as VoIP and other IP-based services, including those provided over wireless connections, means there are no incumbents.¹⁸ Neither Verizon nor CenturyLink provide any empirical support for their claims. Indeed, no commenter

¹⁴ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd. 8622, 8635 ¶ 28 (2010) (“*Qwest Phoenix Forbearance Order*”) *aff’d* *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) (explaining that an analysis that fails to separately evaluate market power in business markets separate from the mass market “is not supported by current economic theory.”).

¹⁵ XO Comments at p. 6.

¹⁶ AT&T Petition at p. 4.

¹⁷ CenturyLink Comments at p. 2.

¹⁸ Verizon Comments at p. 5.

submitted data showing that facilities-based competitive connections to **business** locations are pervasive.

While the ILECs are quick to identify alternative services that are available today, such as wireless, cable, and VoIP, they fail to acknowledge that these competitive services are rarely a substitute for business customers.¹⁹ CenturyLink does not devote a single word of its Comments to addressing competition in the business market. Verizon's only assertion regarding the business market is that "cable broadband services are now available to at least 93 percent of U.S. households as well as a high percentage of businesses."²⁰ But Verizon's statement that service is available to "a high percentage of businesses" lacks credibility as it provides no empirical data supporting the claim. And the underlying material from the NCTA cited by Verizon in support says nothing at all about availability of cable services to businesses. Perhaps this is because, as explained by other parties to this proceeding, cable broadband service is not available to most businesses.²¹ The ILECs' claim that because cable companies are vigorously competing in some markets, all markets should be deregulated,²² makes no sense.

As Granite showed in its Initial Comments, wireless, cable, and VoIP are simply not viable substitutes for most business customers, especially small and medium business customers, many of which cannot be economically reached by anyone but the ILEC.²³ . In addition, the

¹⁹ XO Comments at p. 11, n.18.

²⁰ Verizon Comments at p. 16.

²¹ *See Petition of Ad Hoc Telecommunications Users Committee et al. to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' NON-TDM-based Special Access Services*, WC Docket No. 05-25, at n. 143 (filed Nov. 2, 2012).

²² *See* Verizon Comments at pp. 20-21.

²³ Granite Initial Comments at pp. 25-27.

ILECs' argument that they have no market power with respect to VoIP²⁴ is flawed, given the ILECs' control of the last mile facilities that providers require in order to reach customers with VoIP services.²⁵ Similarly, Verizon's claim that there are no incumbents in the wireless market²⁶ lacks credibility. AT&T and Verizon clearly have a dominant position in those markets in large part as a result of the considerable head start they received from the free wireless licenses they obtained solely by virtue of being the ILEC.²⁷

Even in the residential market, cable's development as a voice and broadband competitor simply shows how two industries that were historically government-sanctioned monopolies have divided the market.²⁸ Verizon, for instance, cannot seriously contend that it vigorously competes with cable, when it has "stated that it will not be expanding its FiOS footprint, presumably because it is simply too expensive to do so."²⁹ And instead of competing head to head with

²⁴ See Verizon Comments at p. 5.

²⁵ XO Communications Comments at p. 28.

²⁶ Verizon Comments at p. 5.

²⁷ *Land Mobile Radio Service*, Docket No. 18262, 46 F.C.C.2d 752 (1974) *aff'd sub nom NARUC v. FCC*, 525 F.2d 630, *cert denied* 425 US 992 (1976). ('finding that "the wireline carriers are the only organizations which have demonstrated that they possess the resources and the expertise necessary to establish cellular systems which would have nationwide compatibility" ... [and that] since a cellular system is technically complex, expensive, and requires a large amount of spectrum to make it economically viable, competing cellular systems would not be feasible in the same area. Also, as these systems will require extensive interconnection with the wireline telephone system, and nation-wide compatibility is desirable, we have concluded that only wireline carriers should be licensed to operate them."').

²⁸ See *Amicus Brief of FCC, OpenBand at Lansdowne, LLC, et al., v. Lansdowne On the Potomac Homeowners Association Inc.*, Case No. 12-1925 at p. 2 (4th Cir. Filed Oct. 10, 2012) (noting Congress' finding that "most cable television subscribers have no opportunity to select between competing cable systems," and citing the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), P.L. 102-385, § 2(a)(2), 47 U.S.C. § 521 nt.).

²⁹ Ad Hoc Comments at p. 11 citing Cecelia Kang, *Verizon Ends Satellite Deal, FiOS Expansion As It Partners With Cable*, Washington Post (Dec. 8, 2011), <http://www.washingtonpost.com/blogs/post-tech/post/verizon-ends-satellite-deal-FiOS->

wireless substitution and cable, Verizon, through its Verizon Wireless subsidiary, struck deals with Comcast, Time Warner Cable, Cox and Bright House.³⁰ Under those agreements, the cable companies and Verizon Wireless agreed to act as sales agents for each other's services, and the cable companies were given an option to resell Verizon Wireless' services.³¹ This hardly sounds like the full throttled competition that AT&T and Verizon tout.³²

The Commission has long recognized the significant barriers associated with deployment of competitive last mile facilities.³³ As Ad Hoc observed, these

barriers to entry are so high that Verizon—a company that already owns substantial “last mile” infrastructure facilities throughout the eastern United States and has unparalleled economic and technological resources—has decided not to compete with the already-established cable monopoly. If Verizon has opted out of competing for additional wired IP connections, it is difficult to envision another entity that would have the resources and the know how to do so.³⁴

This, together with the fact that AT&T can serve only 50% of the office buildings in its footprint with six or more tenants over the next three years with fiber, illustrates the problem that a competitor has in trying to compete with the ILEC to serve businesses.³⁵ If Verizon and AT&T cannot economically construct fiber on a ubiquitous basis, it will be an impossible task for an

expansion-as-it-partners-with-cable/2011/12/08/gIQAGANrfO_blog.html.

³⁰ *Id.*

³¹ Ad Hoc at 11-12 citing *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses*, WT Docket 12-4, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd. 10698 (2012).

³² AT&T Comments at pp. 8, 9; Verizon Comments at p. 19.

³³ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8660-61 ¶ 72 and at 8660 n. 216.

³⁴ Ad Hoc Comments at p. 12.

³⁵ See Laying a Foundation for Future Growth, AT&T Analyst Conference, Nov. 7, 2012 at pp. 11, 40 (noting that AT&T defines a multi-tenant business location as one with six or more tenants).

entrant that lacks the customer base and embedded network of Verizon and AT&T to do so.

Absent the right to access the ILEC's network at locations where deployment of competitive facilities is not economically viable, the entrant will be unable to compete with the ILEC to serve businesses. Finally, the Commission should not assume the existence of adequate competition in the business market absent empirical evidence demonstrating that such competition exists. This showing has not been made.

III. The Commission Must Modify its Existing Competitive Framework to Accommodate Last Mile Access to IP Networks

In its Initial Comments, Granite explained that the plain language of the Act requires that the Commission implement its provisions in a technology neutral fashion.³⁶ In particular, the Commission has held that "the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."³⁷ The comments filed by other parties contain broad support for such an interpretation of the Act, with respect to the pro-competitive sections added in the 1996 Act.³⁸

A. The Commission Should Update its Last Mile Access Policies So They Are Technology Neutral

Granite supports the evolution from TDM to IP and believes that ultimately that transition will benefit customers. If, however, that transition occurs under the current regulatory framework for the business market, where ILECs continue to exercise market power that stems

³⁶ Granite Comments at pp. 36-37.

³⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24011, 24017 ¶ 11 (1998).

³⁸ See, e.g. T-Mobile Comments at p. 5; Cbeyond et al Comments at p. 11; NECA and OPASTCO Comments at p. 7; NARUC Comments at p. 16.

from control of bottleneck last mile facilities, the inevitable transition to IP and broadband networks will come with the heavy price of declining competition in the business market. While that may suit the agenda of the nation's largest ILECs, it is fundamentally at odds with the Commission's statutory mandate and its duty to protect the public interest.

Because the ILECs continue to possess market power with respect to bottleneck last mile transmission facilities, it is imperative that the Commission revisit its rules that prohibit competitors from receiving access to last mile fiber facilities or the packetized capability of hybrid fiber/copper loops such as those that most ILECs (other than Verizon where it offers FiOS) are using to deliver broadband service. Granite agrees with commenters such as XO, Cbeyond, and TEXALTEL that the Commission should revisit its current policies.³⁹ In addition, the Commission should resist Verizon's proposal to eliminate the requirement that an ILEC that has overbuilt its existing copper loop with a fiber to the home loop must provide a CLEC with a 64 Kbps voice channel over that fiber in the event the ILEC will no longer provide CLECs with access to copper loops for serving that customer.⁴⁰

In particular, the Commission needs to address the following rules that have impeded the development of competition and hence impede the transition to fiber-based IP networks. First, the Commission should modify its unbundling rules adopted in the *TRO*, where the Commission limited CLEC access to packetized hybrid loops and eliminated CLEC unbundled access to fiber to the home and fiber to the node loops in order to foster further ILEC investment.⁴¹ Second, in addition to eliminating CLEC access to ILEC fiber under section 251(c)(3), the Commission

³⁹ See XO Comments at p. 25; Cbeyond Comments at pp. 14-15; TEXALTEL Comments at p. 6.

⁴⁰ Verizon Comments at p. 27.

⁴¹ *TRO*, 18 FCC Rcd. at 17143-44, ¶ 275-76 (FTTH); 17149 ¶ 288 (hybrid loops).

eliminated the RBOCs' obligation to provide access to fiber loops and packetized hybrid loops in the Section 271 Forbearance Order.⁴² The Commission should revisit and modify its determinations in these proceedings, consistent with the data driven process promoted by Cbeyond *et al.*,⁴³ to arrive at modified rules that ensure that CLECs have reasonably priced access to last mile transmission facilities wherever a hypothetical reasonably efficient competitor cannot economically deploy alternative facilities.

The bases for the Commission's decision to preclude such access, both under the impairment analysis in section 251 and the forbearance process with respect to section 271, were not technology neutral and were based on assumptions that have not come to fruition. For example, the Commission's decision to preclude CLECs from obtaining access to mass-market fiber loops and the packetized capability of hybrid loops in the *TRO* and the *Section 271 Forbearance Order*, were based on three assumptions that have all been proven incorrect.

The first incorrect assumption was that CLECs and ILECs operate on a level playing field with respect to the deployment of fiber to the home networks.⁴⁴ The ILECs' claims that there is a level playing field for the deployment of competitive facilities have not been proven correct.⁴⁵ This argument ignores the fact that "Natural monopoly" economics still apply to most outside plant: The incremental cost to the incumbent to serve an additional customer is far lower than the

⁴² *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd. 21496, 21499-500 ¶ 6 at 21504 ¶ 19 (2004) ("*Section 271 Forbearance Order*").

⁴³ See Cbeyond *et al.* Comments at pp. 10-15.

⁴⁴ *TRO*, 18 FCC Rcd. at 17125 ¶ 240 (suggesting that "barriers faced in deploying fiber loops ... may be similar" for ILECs and CLECs); 17143 ¶ 275 (assuming that because CLECs as of 2003 had more FTTH deployment that ILECs lacked "a first-mover advantage" when deploying greenfield fiber loops); at 17144 ¶ 276 (assuming that CLECs and ILECs "face the same obstacles in deploying overbuild FTTH loops").

⁴⁵ See, e.g. Tech Freedom Comments at p. 5.

cost for a competitor to do so.”⁴⁶ The ILECs possess “inherent competitive advantages ... from their preexisting and pervasive telecommunications networks, which were developed and deployed across the country over the course of decades.”⁴⁷ These advantages include “a vast network of conduits, poles, wires, pedestals, manholes, and wire center buildings ... largely built under conditions of pre-1996 de jure monopoly and rate of return regulation.” The cable companies likewise cannot serve as a model for other competitors. They too enjoyed government protection from competition for many years and when able to enter the telecommunications markets began with an enormous head start as a result of their control of existing plant and customers stemming from their previously exclusive franchises.⁴⁸

The second failed assumption is that other forms of intermodal competition would arise to provide a third facilities-based competitor to the ILEC/Cable duopoly.⁴⁹ Granite showed in its initial comments that this predictive judgment has proven to be factually incorrect.⁵⁰

Finally, the Commission based its decision with respect to both the *TRO* and Section 271 forbearance on a belief that eliminating competition via unbundling would provide the ILECs enough incentive to build fiber to the home.⁵¹ But that largely has not happened. And it has not happened for the same reason that CLEC deployment of fiber has not happened on the scale the Commission predicted. Building fiber networks is too expensive in most cases. The barriers to entry the Commission has consistently identified are persistent and not easily overcome.

⁴⁶ Interisle Consulting Comments at p. 4.

⁴⁷ Competitive Carriers Association at p. 10.

⁴⁸ *Supra*, n. 28.

⁴⁹ See Granite Comments at p. 43, n.139.

⁵⁰ *Id.*

⁵¹ *Section 271 Forbearance* Order, 19 FCC Rcd. at 21505, ¶ 21; *TRO*, 18 FCC Rcd. at 17145 ¶ 278.

Verizon contends that the Commission's unbundling rules have been "a success" and that changing course now would have a negative impact on broadband investment.⁵² Comments from other parties persuasively dispute Verizon's claim. COMPTTEL observes that according to the Commission's Local Telephone Competition Report,⁵³ during the first 8 years since the Commission concluded that relieving ILECs from unbundling requirements for their fiber optic and packet-based facilities would promote investment in, and deployment of, next-generation networks, ILECs have only deployed VoIP to serve 5% of their end users.⁵⁴ In fact, the Commission's Local Telephone Competition Report shows that non-ILECs provision more than 10 times as many VoIP lines to business customers as ILECs.⁵⁵

Cbeyond *et al.* demonstrate the fallacy underlying AT&T's argument that "regulation chills investment."⁵⁶ They highlight AT&T's admission that "CLECs are leading providers of Ethernet services, and ILECs have 'respond[ed] with further investments in their own Ethernet offerings.'"⁵⁷ They also correctly point out that "[t]he Commission has already recognized that maintaining competition policy actually gives both ILECs and competitors the incentive to invest and innovate in order to remain competitive," citing the Commission's *Phoenix Forbearance Order*.⁵⁸

⁵² Verizon Comments at p. 43.

⁵³ "Local Telephone Competition: Status as of December 31, 2011", Industry Analysis and Technology Division, Wireline Competition Bureau, January 2013 ("Local Telephone Competition Report").

⁵⁴ COMPTTEL Comments at pp. 3-4 citing *id.* at tables 4 and 5.

⁵⁵ See Local Telephone Competition Report at Table 11 (reporting 526,000 business VoIP lines served by non-ILECs, 5,227,000 VoIP lines served by ILECs).

⁵⁶ Cbeyond *et al.* Comments at p. 27.

⁵⁷ *Id.* at p. 3.

⁵⁸ *Id.* at p. 27.

Even Verizon, which did deploy fiber to the home, has never committed to extend FiOS to 100% of its territory. It has recently indicated that there will be little future expansion beyond its current 60 percent level and has essentially thrown in the towel in the race against cable by agreeing to its joint marketing agreement. Similarly, in the business market, AT&T's statement that it is deploying fiber to only 50% of the multi-tenant business locations in its territory with six or more tenants is indicative of the difficult economics of fiber deployment by even those companies with the deepest pockets of all.⁵⁹

Most importantly, the Commission has consistently acknowledged that competition depends upon competitive access to other parties' networks because it is not possible for every competitor to construct its own connection to the customer. For example, in compelling CMRS carriers to enter into agreements for data roaming the Commission acknowledged that for certain services, the public expects "nationwide seamless connectivity."⁶⁰ The Commission has readily acknowledged that, even for the competitive wireless sector, "there may be areas where building another network may be economically infeasible or unrealistic."⁶¹ In such areas, the Commission views the availability of data roaming as critical to allow regional providers to compete with national providers.⁶²

The Commission also found that the data roaming requirement would "encourage

⁵⁹ See n. 35, *supra*.

⁶⁰ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411, 5416 ¶ 11 (2011) ("Data Roaming Order") *aff'd* *Cellco Partnership v. FCC*, 700 F.3d. 534 (DC Cir. Dec. 4, 2012).

⁶¹ *Data Roaming Order*, 26 FCC Rcd. at 5419 ¶ 15.

⁶² *Id.*

investment in and deployment of broadband networks by multiple service providers.”⁶³ The availability of roaming arrangements assures providers that “if they make the investment to expand or upgrade their facilities, they will be able to offer competitive service options to their customers through a combination of local or regional facilities-based service and roaming arrangements.”⁶⁴ The same is true here.

For these reasons, the Commission must revisit its rules that prohibit CLECs from obtaining access to fiber loops and packetized hybrid loops, particularly in the business market, in which viable non-ILEC alternatives are few and far between. Assuring that CLECs have access to competitive facilities where it is not economic for them to deploy their own or obtain alternative facilities is sound policy and consistent with the Commission’s roaming decisions applicable to the CMRS market.

B. The Commission Must Retain the 64 Kbps channel requirement where ILECs have retired copper loops

Verizon argues that the Commission should eliminate the ILEC obligation to “provide unbundled access to a 64 kbps transmission path over its FTTH loop” when the ILEC has overbuilt its copper loop with a fiber loop as required under rules adopted in the Triennial Review Order.⁶⁵ Verizon’s argument that this requirement is “wasteful” and provides “competing carriers access to brand-new networks without having borne the substantial risks of the investments funding them”⁶⁶ is specious. Where Verizon is providing a 64 kbps channel over FiOS it can hardly be said to providing a CLEC “access to a brand new network.”

⁶³ *Data Roaming Order*, 26 FCC Rcd. at 5419 ¶ 16.

⁶⁴ *Id.* at 5420 ¶ 17.

⁶⁵ Verizon Comments at p. 27; *see* 47 C.F.R. § 51.319(a)(3)(iii)(C).

⁶⁶ Verizon Comments at p. 27.

To the extent the Commission allows ILECs to retire copper loops that CLECs need to provide service to residential customers and business customers whose needs can be served by a 64-kbps channel, the 64 kbps rule deserves protection. The Commission articulated that the ILEC has “an entry barrier within its sole control” that could deny CLECs access to customers for the provision of narrowband - i.e. voice service.⁶⁷ In other words, the limited channel Verizon is obligated to provide is sufficient only for voice service and CLECs do not have the ability to use any of the new features of Verizon’s “brand new network[.]”

Further, it is a myth that Verizon and the ILECs perpetuate that their competitors are equally capable of building fiber to the home networks. Verizon is well aware that it could not have justified its considerable investment in FiOS absent the existing base of ubiquitous customers that result from its historic monopolies. Similarly, Verizon obtained the poles, conduit, building access, and other infrastructure it uses to deploy FiOS when Verizon was a state-sanctioned monopoly, and competition was outlawed. Furthermore, the only other companies that have deployed high speed broadband networks to mass market customers on a scale similar to FiOS are the cable companies who were — not surprisingly— protected monopolies until the 1992 Cable Act.⁶⁸

There is no coherent rationale for eliminating this rule, despite the arguments of the RBOCs’ supporters, such as those of Tech Freedom, that:

Even the current 64 kbps channel requirement stands on shaky legal ground at best. The FCC issued this rule when broadband services provided by ILECs were still regulated as telecommunications services under Title II of the Communications Act. But in 2005 the FCC subsequently reclassified wireline

⁶⁷ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd. 16978, 17144 ¶ 277 (2003) (“TRO”) (subseq. history omitted).

⁶⁸ *Supra*, n. 28.

broadband as an information service, subjecting ILECs to far less oppressive regulations under Title I. If access requirements for IP networks were challenged, a court would almost certainly rule the FCC no longer has any direct statutory authority to continue this invasion of property rights.⁶⁹

This argument is absurd. First, the Commission's unbundling rules were upheld in the D.C. Circuit in 2006, after the Supreme Court's *Brand X* decision.⁷⁰ Second, the Commission's *Wireline Broadband Order* clearly indicated that carriers were free to offer the transmission component of wireline broadband service as a telecommunications service.⁷¹ More importantly, the *Wireline Broadband Order* explained that the Commission's unbundling "rules look at what use a [C]LEC will make of a particular network element when obtaining the element" pursuant to the Act's unbundling provision in section 251(c)(3).⁷² Thus, if a CLEC requests access to a 64 kbps channel over Verizon's FiOS network, the dispositive question is not the classification of Verizon's service, but whether the CLEC "intends to provide a telecommunications service over that facility."⁷³ Since voice is still a telecommunications service, this issue is quite easily resolved. Thus, there is no reason for the Commission to eliminate the 64 Kbps access required under the current rules. To the contrary, the Commission should clarify that such access is required under Section 271 as well as under Section 251.

⁶⁹ Tech Freedom Comments at p. 6.

⁷⁰ See e.g., *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

⁷¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, 14901 ¶ 90 (2005) ("*Wireline Broadband Order*") *aff'd sub nom Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

⁷² *Id.* at 14923 ¶ 127.

⁷³ *Id.* The Commission further noted that "nothing in this Order changes a requesting telecommunications carrier' UNE rights under section 251 and our implementing rules." *Id.*

IV. The Commission Should Reject AT&T's Proposal for a Regulatory Trial

It is important to be clear about the type of trial AT&T proposes. AT&T calls the section of its Petition regarding trials as a request for a “Proceeding to Conduct Trial Runs for Regulatory Reform.”⁷⁴ AT&T's Comments repeatedly refer to the trials as “regulatory trials.”⁷⁵ AT&T suggests that the Commission “seek public comment on how best to implement specific regulatory reforms” and in the trial “eliminate . . . outdated ‘telephone company’ regulations that may require carriers to maintain legacy TDM-based networks and services even after replacement services are in place.”⁷⁶ “Carriers (including carrier customers) would be precluded from demanding service or interconnection in TDM format” and would have “no right to demand TDM-based interconnection.”⁷⁷ Most significantly, AT&T states

the Commission would also keep IP services free of legacy regulations so that the trial may proceed without the distorting and investment-chilling effects of such regulations. As noted, AT&T believes that this regulatory experiment will show that conventional public-utility-style regulation is no longer necessary or appropriate in the merging all-IP ecosystem.⁷⁸

Despite the apparent support of some for technical trials,⁷⁹ it should be clear that AT&T is not proposing technical trials, for which the Commission rulemaking that AT&T requests would not be needed. As NECA and OPASTCO observe, it is “unclear at this point why

⁷⁴ AT&T Petition at 20-23.

⁷⁵ AT&T Comments at pp. 1, 2, 4, 5.

⁷⁶ AT&T Petition at p. 21.

⁷⁷ *Id.*

⁷⁸ *Id.* at p. 22.

⁷⁹ *E.g.* TechNet Comments at p. 5 (noting that TechNet members “routinely use trial runs and other forms of experimentation to test innovative, new technologies to determine if they are ready for wide-scale release.”) Such support may be based on a misapprehension that AT&T is proposing technical, rather than regulatory, trials.

permission or regulatory relief from the Commission would be needed to conduct a ‘technical’ trial.”⁸⁰ Rather, AT&T is clearly proposing “regulatory” trials, in which TDM technology is effectively prohibited and “legacy regulation” is wiped off the books, in what NTCA aptly called a “Wild West” approach.⁸¹ The Commission should reject AT&T’s proposal for such trials.

The fundamental flaw in AT&T’s proposal is that it depends on an heroic assumption. AT&T asks the Commission to assume that in negotiating commercial agreements outside of the context of a trial, AT&T and other ILECs with market power will not exploit that power. But those with such market power have every incentive, *outside* the context of a Commission-supervised trial, to exploit that power. While such a trial would in concept be a test of AT&T’s recommended “Wild West” approach, many commenters agreed with Granite that the trial would in reality only test whether AT&T and other ILECs with monopoly control of the last mile connections to most customers know how to be on their best behavior during a test that is carefully monitored by the Commission.⁸² For example, T-Mobile observed that:

trials that experiment with deregulation that strips away important competitive protections, as AT&T proposes, would be counterproductive and highly unlikely to yield meaningful results . . . because the behavior of the parties involved in the test would necessarily be constrained by their knowledge that the Commission is using the test bed for an assessment. In a trial run, ILECs hoping to encourage the Commission to adopt deregulatory policies will have an incentive to refrain from abusing market power, but this incentive will disappear once the Commission eliminates pro-competitive regulations.⁸³

Likewise, Cablevision argued that:

⁸⁰ NECA & OPASTCO Comments at p. 11.

⁸¹ See AT&T Petition at pp. 21-22; NTCA Petition at p. 8.

⁸² See Granite Comments at p. 53.

⁸³ T-Mobile Comments at p. 17.

ILECs would have every motive to manipulate the results of such trial runs to favor their desired policy outcomes. Given ILECs' continued market power, they would be able to simply negotiate deals that arrive at whatever terms they deem most helpful in convincing the Commission that oversight of interconnection agreements is no longer needed when traffic is exchanged in IP. The predictable result of such trial runs is that ILECs would simply decline to exploit their market power during the "trial" phase . . . and then turn around and extract monopoly rents as soon as they are released more permanently from their interconnection obligations. Put simply, there is no reason to trust that the trial runs proposed by AT&T would yield anything resembling the actual results of the "market-based, regulation-free" interconnection regime that AT&T ultimately desires.⁸⁴

Many others agreed.⁸⁵

The trials simply will not model how those with market power will behave if the Commission grants AT&T's request for a marketplace that lacks any pro-competitive requirements after the trial is declared a success. As XO observed, the results of the trial will be "distorted" because "the ILECs would have every incentive to be on their best behavior given the potential long-term upside for cooperating. . . ."⁸⁶ Neither AT&T nor any of its supporters has articulated a means for the Commission to ensure that the behavior during the trials of those with market power will accurately predict how those same entities will behave in an environment from which pro-competitive legal requirements have been eliminated on a permanent basis.

⁸⁴ Cablevision Comments at pp. 5-6.

⁸⁵ See Public Knowledge Comments at p. 9 (trial will not "provide much evidence of anything other than that AT&T can behave for two years when it knows regulators are scrutinizing its behavior"); XO Comments at p. iii ("the experiments, rather than reflecting reality, are likely to cause the ILECs temporarily to be on their best behavior with the hopes of obtaining long-term, widespread rewards"); Association of TeleServices, International Comments at p. 4 ("Experience gained during trials proposed by AT&T would be almost entirely artificial and not a reasonable guide to the actions and conduct that policies would have to grapple with in the future.").

⁸⁶ XO Comments at p. 32.

Indeed, neither AT&T nor its supporters have even articulated a single metric that would be measured during the trials, let alone what that metric would need to show for the trial to be declared a success.⁸⁷

Moreover, contrary to the suggestions of AT&T's supporters that "the risk of any harm to customers or competitors would be limited,"⁸⁸ the trial will irreversibly disrupt existing relationships between CLECs and their customers, causing untold economic damages to the customers, the CLECs, and the marketplace, even if the test is declared a failure. Granite has shown that existing commercial agreements under Section 271 provide CLECs no ability to access ILEC fiber, while the Commission's rules do not permit CLECs to access ILEC fiber or packet-switched service under Sections 251 and 252.⁸⁹ To provide a second layer of assurance that it would not have to permit CLECs to access its fiber and IP network, AT&T's Petition also states that in its proposed trial, ILECs would be "free of legacy regulation" for their fiber-based and IP services.⁹⁰

CLECs would thus lose access to the customers they have been serving through purchase of last mile access from the ILEC pursuant to Sections 252 and 271. As XO points out: "AT&T's trial run proposal, if adopted, would likely disrupt customers of the ILECs' competitors and potentially impose tremendous burdens on them without the Commission having first concluded that that the regulatory changes the experiment will test are justified."⁹¹

⁸⁷ See also Sprint Nextel comments at p. 5 ("AT&T does not explain how the removal of all regulatory obligations would address the technical issues associated with IP interconnection or speed the negotiation of IP interconnection agreements.")

⁸⁸ Adtran Comments at p. 6.

⁸⁹ Granite Comments at pp. 4, 28, 35.

⁹⁰ AT&T Petition at pp. 21-22.

⁹¹ XO Comments at pp. 32-33. See also Rural Broadband Policy Group Comments at 3

The trial would also leave CLECs at the mercy of AT&T and other ILECs with respect to interconnection. The Commission stated in its *Connect America Fund* Order that “we expect good faith negotiations for IP-IP interconnection.”⁹² This itself is a form of a trial, one in which the Commission is placing great faith that those with market power will behave reasonably in commercial negotiations, although the Commission is not closely monitoring the performance of the parties. The Commission should examine the results of this and other trials, in which ILECs have been freed of regulatory obligations, other than the duty to negotiate in good faith, before embarking on another trial, as proposed by AT&T.⁹³

The Commission has not examined the results of this IP-to-IP trial, but the early results are not encouraging. As shown in the Comments of Sprint and Cbeyond *et al.*, AT&T has refused SIP interconnection.⁹⁴ Moreover, several CLECs, seeking to enter into SIP interconnection agreements with Verizon on a nondiscriminatory basis under Section 252(i),

(in AT&T’s trials, “consumers will have no ability to opt-out from the trial and risk losing reliable, affordable, and protected telephone service.”).

⁹² *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd. 17663, 18045 ¶ 1011 (2011) (subseq. history omitted).

⁹³ Granite disagrees with the position expressed by CTIA, a commenter dominated by the two largest ILECs, that “light touch” regulation should be used in the wired telecommunications market because it has been successful in the wireless market. CTIA Comments at p. 5. The critical difference between the two markets is that there is no last mile bottleneck monopoly in the wireless market. The presence of such a monopoly is the principal reason for pro-competitive requirements in the wired market, and changing switching from TDM to IP does not alter that basic fact. Thus, the success of a light regulation approach in the wireless market is not probative as to the impact of a similar approach in the wired market.

⁹⁴ Sprint Comments at pp. 27-32; Cbeyond *et al.* Comments at p. 13. Verizon argues that “the Commission’s first choice should be to allow market forces to function and protect consumers.” Verizon Comments at p. 21. This conduct suggests that market forces are not functioning very well.

recently filed a petition with the Massachusetts Department of Telecommunications and Cable (“DTC”), seeking an order directing Verizon to file any SIP interconnection agreements with the DTC.⁹⁵ Under AT&T’s proposed trial, the only assurance that CLECs, RLECs, and wireless carriers will have that AT&T and other ILECs will engage in reasonable SIP interconnection is their desire to have the trial declared a success. If the trial ends and is declared a success, this sole protection for carriers interconnecting with ILECs will disappear.

Before undertaking a trial, the Commission must also assure itself that if the trial is *not* a success, competitive conditions can be restored to their present state.⁹⁶ Granite shares the fears of other commenters that this cannot be done, that it will be impossible to, in effect, put the toothpaste back in the tube. As XO stated, “There would be no mechanism to undo the harms that would occur when AT&T’s experiments prove unsuccessful or resources to . . . restore the markets to their former status.”⁹⁷ As T-Mobile observed, “[t]he odds of reversing ILECs abuse of their remaining bottleneck tollbooths becomes much more difficult after the fact; more fundamentally, the benefits of a competitive IP network architecture will be undermined, to the detriment of consumers.”⁹⁸

V. Any Trial Must Preserve Competition

As shown above, no trial in which the Commission is examining results will provide the Commission with a realistic view of competitive conditions that will result if the Commission

⁹⁵ Competitive Carriers’ Petition to Require Filing and Review of FiOS Digital Voice Interconnection Agreement, DTC 13-2 (filed Jan. 31, 2013).

⁹⁶ See HyperCube Comments at pp. 18-19 (“the affected offices should be able, and generally required, to be returned to their pre-trial status following the completion of the trial period”).

⁹⁷ XO Comments at p. iii.

⁹⁸ T-Mobile Comments at p. 17.

adopts AT&T's view of a market without pro-competitive requirements. Therefore, if the Commission nevertheless decides to conduct a trial, it should ensure that the trial itself causes no harm to competitive conditions. As TelePacific has recommended:

The Commission should reject AT&T's proposed trial, as proposed. Should the Commission decide, however, to proceed with a trial, safeguards should be implemented to ensure that it is conducted in a manner that is fair and minimizes the public harm that will inevitably result from it. First, to ensure that the appropriate trial wire centers are picked, ILECs should not have the sole discretion to choose which wire center is subject to the trial. Rather, the Commission should identify the trial wire centers after it affords a full opportunity to all interested parties to provide input on which wire centers to select for the trial.

Second, the Commission should establish a set of ground rules under which the trial is conducted. The Commission should allow all interested parties to provide input on such ground rules, which should be designed to prevent damage to competition.

Granite agrees with Public Knowledge that AT&T's proposed trials are "too ill defined," and that "what metrics the FCC and state regulators would apply, and what would be the desired outcome"⁹⁹ must be established. Granite also shares XO's view that an experiment should ideally have a control group. This would permit a comparison of results under AT&T's proposed "Wild West" conditions with results in locations "where the regulatory requirements that AT&T targets remain in place."¹⁰⁰ This should only be done if the many concerns that XO (and Granite) have identified regarding injury to competition "could somehow be adequately addressed."¹⁰¹ Granite believes that, as discussed above, addressing these concerns in a way that both avoids harm to

⁹⁹ Public Knowledge Comments at pp. 9-10.

¹⁰⁰ XO Comments at p. 34.

¹⁰¹ *Id.* at p. 34; *see id.* ("Without a control group, AT&T's theories about the harms that supposedly would result from maintaining the regulatory obligations in place would remain untested.").

competition and provides realistic insight into the behavior of ILECs in an unregulated world is impossible. While Granite's preferred alternative is to hold no trial at all, as between conducting an unrealistic trial and conducting a trial that harms competition, Granite suggests that the unrealistic trial is the lesser of evils, as it does not harm the market.

Therefore, the Commission must take affirmative steps to ensure that competition is preserved in any trial. The importance of such steps is underscored by the conduct of AT&T and Verizon in refusing SIP interconnection, as discussed above. In addition, despite its current obligations under Section 271, AT&T has been unwilling to provide CLECs with access to its last mile fiber loops on a commercial basis.¹⁰² It would be pure fantasy to assume that if the Commission grants AT&T's request that it eliminate all regulatory obligations, AT&T would suddenly be willing to provide CLECs with last mile access on a reasonable basis. Granite has shown that intramodal competition from CLECs is the only competition available for most business customers, especially multi-location business customers,¹⁰³ while the Commission has found that CLEC self-provisioning last mile facilities to small and medium size businesses and residential consumers is not economical.¹⁰⁴ Therefore, if the Commission eliminates any obligation for ILECs to provide last mile access to CLECs, there will be virtually no competition at all for most business customers.

VI. Conclusion

For the reasons stated above, Granite requests that the Commission reject AT&T's Petition and suggestion of trials. If it orders trials, they should be subject to conditions that

¹⁰² Granite Comments at p. 28.

¹⁰³ *Id.* at pp. 22-26; *see supra* at pp. 7-12.

¹⁰⁴ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8670, ¶ 90 (citing *TRO*, ¶¶ 85-91).

prevent the trials themselves from undermining competition by withdrawing access to competitors of facilities that are currently available to them to serve customers.

Respectfully submitted,

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